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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 72

A. B. SWINERTON, RICHARD WALBERG and HOWARD HASSARD, d/b/a Swinerton and Walberg Company, and JABEZ BURNS & SONS, INC.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

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In its brief in opposition to the petition for certiorari, the National Labor Relations Board concedes that the representation election provisions of the Na-

tional Labor Relations Act have not been made generally available to employers and unions in the building and construction industry. The Board's sole argument against the granting of certiorari is that "even if the election procedures of the Act had been available and all the statutory conditions relating to union-security agreements had been satisfied, petitioners could not have pursued as they did an employment policy conditioning hiring of employees for millwright jobs upon membership in the Carpenters" (Brief, pp. 14-15).

In advancing this argument the Board is playing a game of cat and mouse with petitioners, and with the entire building and construction industry.

As petitioners offered to prove in this case (R. 146, 156), Robert N. Denham, then General Counsel of the Board, proposed on December 19, 1949, that he and the Board announce an enforcement policy under which employers and unions in the building and construction industry would have been given assurance that if they conformed their union-security agreements and practices to the 30-day requirement of the Act, they would be protected against unfair labor practice charges notwithstanding the absence of elections.

General Counsel Denham proposed the following (R. 159-160):

> "In view of the foregoing, the National Labor Relations Board and the General Counsel of the Board, in processing unfair labor practice charges under the Act, based upon union security con-

tracts, arrangements, or practices in the portions of the organized building and construction industry for which no administrative machinery for conducting union shop elections has been established;

(1) Will deem the union shop authorization requirements of Section 8(a)(3) and 9(e) to have been met, despite the fact that no election may have been held, until such time as administrative machinery has been established and made available to the public;

(2) Will compute the 30-day provisions of Section 8(a)(3) as satisfied by a showing of total employment for 30 days by any employer or employers, either singly or in the aggregate, in the unit covered by the collecting bargaining contract containing the union security provisions; and

(3) Will process in normal fashion all cases which, despite the considerations set forth in paragraphs (1) and (2) above, involve violations of any of the unfair labor practice sections of the Act.

This policy will apply only to those situations within the industry where, because of the difficulties heretofore described, it is administratively impracticable to conduct an election pursuant to Section 9(e) of the Act, and where the union has fully complied with the filing requirements of Section 9 (f), (g) and (h) of the Act. It does not apply to those situations where employment is sufficiently stable to permit the conduct of elections. Nor does it apply to that type of conduct with respect to union security which is outside the allowable area defined in the proviso to Section

8(a)(3) of the Act and which would be within the prohibition of Sections 8(a)(3) and 8(b)(2) notwithstanding actual union security authorization."

On June 6, 1950, the Board, in a public statement of policy on the building and construction industry, rejected the General Counsel's proposal, saying in part:

> "Assuming that we are to continue to exercise jurisdiction over the building construction industry, and yet that some of the union shop provisions of the Act cannot be made to work there, it is our duty to report that fact to the Congress, rather than to change the law ourselves by administrative exemption of a single industry.
>
> Of course, so long as the General Counsel thinks it fairest and best to exercise his exclusive discretion by declining to issue complaints of unfair labor practice if employees are discharged pursuant to an unauthorized union-shop contract, the Board could not, if it would, conduct a hearing or find a violation of law. *If and when, however, any such case reaches the Board Members for decision, we will have no choice but to enforce the law as written."*[1]

The Board's statement of policy of June 6, 1950, was reprinted in full as Appendix C to its brief before the Court of Appeals in this case. In so far as petitioners or any other employers or unions in the building and construction industry are advised, such

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[1]Throughout this brief, emphasis is added unless otherwise noted.

statement continues to reflect the inflexible policy which is being and will be enforced against the industry. Thus, even if the effectiveness of the union security provision of the applicable collective bargaining agreement (R. 139-140) had not been conditioned upon certification of the Union by the Board and even if petitioners had conformed their hiring practices to the requirements of that union-security provision, they would have been liable to punishment by the Board for unfair labor practices.

The reported decisions of the Board reflect the indisputable fact that the Board is enforcing to the hilt the unfair labor practice provisions of the Act against employers and unions in the building and construction industry at the same time that it is withholding the benefits and protection of the representation provisions of the Act. For the reasons set forth in the petition, we contend that such an enforcement policy defeats rather than effectuates the policies of the Act, since it disrupts rather than stabilizes labor relations in the industry.

We do not understand the Board as denying that its policy is disrupting labor relations in the building and construction industry. In its statement of policy it says that it must "enforce the law as written". In its brief before this Court it adopts as its own the observation of the Court of Appeals that the "effect of these difficulties on enforcement of the Act is essentially 'for Congress rather than the courts'" (Brief, p. 16). As we read the Board's brief, it concedes that

its present policy with relation to the building and construction industry is not achieving the primary objective of the Act, namely, stability of labor-management relations, but it contends that neither it nor the Courts can do anything about the situation.

It is this premise that we challenge. As we pointed out in the petition (pp. 34-38), the principal guide which Congress established for the Board in its administration of the Act was that such administration "effectuate the policies of the Act". Pursuant to the discretion granted by this directive the Board, for a period of over ten years, declined to enforce *any* of the provisions of the Act in so far as the building and construction industry was concerned. In 1948, as a result of the enactment of the Labor Management Relations Act of 1947, it determined to exercise its conceded jurisdiction over the industry. It then encountered difficulties in performing with respect to the industry one of its two principal functions under the Act, namely, that of certifying collective bargaining representatives for appropriate bargaining units. Instead of adjusting its administration of the Act to avoid the disruption in labor relations which has flowed inevitably from these difficulties, it has asserted and still asserts that the Act gives it no discretion to withhold enforcement of the unfair labor practice provisions until the difficulties with the representation provisions have been solved. It is apparent that unless and until this Court intervenes with a clear delineation of the Board's discretion and duties

with relation to this important industry, the Board will continue blindly to snipe and tear at the long-established labor-management relations in the industry until Congress affords relief, or until those relations, which have long been an exemplar of peace and stability, have been destroyed.

The inequity of the Board's policy is so apparent that the Courts of Appeals, in other cases decided subsequently to the decision in this case, have sought vainly for a satisfactory answer to our contention short of the one which we ask this Court to give.

In *National Labor Relations Board v. Reed* (C.C.A. 9th, June 22, 1953) ___ F. (2d) ___, 23 C.C.H. Labor Cases, par. 67,457, the respondent building subcontractor urged that it was an abuse of discretion to penalize him for yielding to the pressure of a building trades union for action designed to maintain union discipline, where the parties had been foreclosed by the ineffectiveness of the representation and union-shop provisions of the Act from entering into and enforcing a valid union-security agreement. The Court of Appeals first answered this argument by saying that there was no inequity "for the Act does not provide for exemptions to violations of Sections 8(a)(1) or 7". It subsequently realized that the Act *does* provide an exception to the prohibitions of Section 7 which validates action pursuant to an "agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)," and on August 13, 1953, it amended its opinion

to state that there was no inequity in the case for the reason that since the charging party was a dues-paying member of the respondent Union "the Union already had all the benefits it could obtain under the exception to Section 7". Obviously, such an answer would have no validity in the usual case where the party charging discrimination is not a member of the union or is delinquent in his dues.

In *Eichleay Corp. v. National Labor Relations Board* (C.C.A. 3rd, August 26, 1953), ... F. (2d) ....., 24 C.C.H. Labor Cases, par. 67,802, the Court had before it a petition to set aside the order of the Board in *Eichleay Corporation* (1953), 102 N.L.R.B. No. 63, cited at pages 17 and 18 of the petition in this case. Pursuant to charges filed by the International Association of Machinists, the Board had ordered the Eichleay Corporation to cease and desist from entering into and enforcing an oral agreement or understanding conditioning the hire and tenure of employment of millwrights upon membership in the Carpenters Union.

The Court acknowledged that the failure of the Board to devise workable representation procedures for the building and construction industry had, in practical effect, outlawed the union-shop insofar as that industry was concerned. Nevertheless, it rejected the argument that enforcement of the Board's order would not effectuate the policies of the Act, since in its opinion the Board *must* issue a cease and desist order once it has determined that a prohibited prac-

tice exists and the Court "must say to Eichleay, as other Courts have said when faced with the problem, that if it is aggrieved its remedy lies not in the Courts but in Congress".

Petitioners respectfully submit that in both the *Reed* and *Eichleay* cases, and in the case now before this Court, the Courts of Appeals have missed the basic point of the argument against permitting the Board to enforce the unfair labor practice provisions of the Act while it is withholding the benefits and protection of the representation provisions of the Act. The argument *assumes* that the employer or union involved in any particular case has been guilty of conduct constituting an unfair labor practice. Petitioners claim that in most such cases, and certainly in the case now before this Court (Petition, pp. 20-21), the employers have become involved in questionable practices solely because of the absence of the methods and procedures which Congress intended should be available for the protection of the legitimate union-security rights of the building trades unions. The enforcement of the unfair labor practice provisions of the Act under these circumstances defeats rather than effectuates the will of Congress, and it is the right and duty of the Courts to intervene in the manner urged in the petition.

It is inconceivable that an Act which permitted the Board to withhold application of any of its provisions to the building and construction industry for a period in excess of ten years does not have suffi-

cient flexibility to permit the practical adjustment of its procedures to the realities of labor-management relations in that industry. The remarkably stable relations which have existed in the industry have been hammered out by employers and unions over a period which commenced many years before the enactment of the original Wagner Act. There is nothing in the Act which in terms prevents the Board from accepting these relationships as it finds them and certifying as appropriate, without elections, the bargaining units which employers and unions have forged over the years and consolidated by written collective bargaining agreements.

Petitioners believe that if and when the Board is called before the bar of this Court to give an account of its stewardship, and if and when it is told by this Court, as it should be told, that the Act requires that it adjust its administration to effectuate the policy of stabilizing labor-management relations in the building and construction industry, it can and will devise workable procedures to give employers and unions in the industry the benefit and protection of the representation provisions of the Act.

The Board and the Courts of Appeal have made abundantly clear that only this Court can settle the important question as to whether the Courts have the authority to protect employers and unions in the building and construction industry against administrative action which all who have considered the matter—the Senate Labor Committee, the Board itself and

the Courts—concede is disruptive of labor-management relations in the industry. This question would have vital significance even if Congressional relief for the industry within the near future were certain, since it is important to the due administration of the National Labor Relations Act, and of all other regulatory acts, to reaffirm the principle that the administrator must at all times conform his procedures to the basic guides and objectives laid down by Congress. The question derives even greater significance and urgency from recent events, of common knowledge, which indicate that amendment of the Act is so deeply involved in practical political considerations that legislative relief for a single industry may be long deferred.

For the reasons set forth in the petition and in this reply brief, petitioners respectfully submit that this Court should grant certiorari in order that the question may be settled at the earliest possible date.

Dated, San Francisco, California,
September 28, 1953.

Respectfully submitted,
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